Comptroller General
of the United States

Washington, D.C. 20548

REDACTED VERSION*

Decision

Matter of: Test Systems Associates, Inc.

File: B-256813.5

Date: October 14, 1994

Patrick G. Brady, Esq., and Joseph G. Lee, Esq., Carpenter, Bennett & Morrissey, for the protester.
John M. Falk, Esq., and James H. Falk, Sr., Esq., The Falk Law Firm, for D.K. Dixon & Company, Inc., an interested party.
Jonathan H. Kosarin, Esq., and Karen Gearreald, Esq., Department of the Navy, for the agency.
Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under total small business set-aside solicitation, where offeror checked the wrong box and certified that "not all supplies to be furnished" would be manufactured by a small business concern, proposal was unacceptable under the terms of the solicitation.

2. An ambiguity exists in a solicitation if a material solicitation term is subject to more than one reasonable interpretation. Where protester relies on its own reasonable interpretation of such a material term and is materially prejudiced by agency's contrary interpretation, solicitation is defective.

DECISION

Test Systems Associates, Inc. (TSAI) protests the award of a contract by the Department of the Navy to D.K. Dixon & Company, Inc. under request for proposals (RFP) No. N00189-93-R-0378, a total small business set-aside for operational test program sets. TSAI contends that the solicitation contained a misleading and defective Small Business Concern Representation (SBCR) clause, which misled the firm into certifying that "not all supplies to be furnished" would be manufactured or produced by a small business concern; that the agency, which should have known about this solicitation

*The decision issued October 14, 1994, was subject to a General Accounting Office protective order. The parties have agreed that the entire text can be removed from the coverage of that protective order, and the decision therefore appears here in full.

defect, failed to conduct meaningful discussions with TSAI to clarify the matter; that the solicitation defect compromised the integrity of the entire procurement process since no offeror could submit a conforming proposal under the RFP's terms; and that, specifically, Dixon's proposal was "nonconforming and unacceptable" because its certification was made pursuant to the defective SBCR clause contained in the RFP.[1]

We sustain the protest because we find that the solicitation contained a defect which misled the protester into mis-certifying its willingness to furnish small business end items and because we also find that the agency took inappropriate corrective action upon discovering the protester's mis-certification after award.

The RFP was issued on October 27, 1993, with an initial closing date of January 13, 1994. The RFP stated that award would be made to the responsible offeror whose proposal, conforming to the solicitation, was determined to offer the "greatest value" to the government, cost and other factors considered. Offerors were required to submit separate technical and cost proposals. The technical proposals were to be evaluated under the evaluation factors of management, engineering, and integrated logistic support, each with numerous subfactors. The RFP also stated that cost proposals would be "of less importance" than technical proposals and would be evaluated for cost realism.

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[1]Currently, both Dixon and TSAI have suits pending regarding this award in the United States District Court for the District of Columbia, raising the same issues which are present in the protest. This decision by our Office is in response to the court's request that our Office issue a decision to the court pursuant to the suit filed by TSAI (Civil Action No. 94-1322 SSH). Ordinarily, we will dismiss a protest where the matter involved is the subject of litigation before a court of competent jurisdiction; however, where, as here, the district court so requests, we will issue a decision in the matter and will address issues that would otherwise have been dismissed as untimely raised. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1994); Blue Cross and Blue Shield of VA, B-222485, July 11, 1986, 86-2 CPD ¶ 61.

The RFP incorporated a clause entitled "Notice of Small Business Set-Aside (APR 1991),"[2] which stated, in relevant part, as follows:

> "A manufacturer or regular dealer submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns . . . ." [Emphasis Added.]

The RFP also required each offeror to make certain representations and certifications. Section K of the RFP contained the following required representation:

> "K11 Small Business Concern Representation (FAR 52.219-1) (JAN 1991)
>
> The offeror represents and certifies as part of its offer that it ___is, ___is not a small business concern and that ___ all, ___ not all supplies to be furnished will be manufactured or produced by a small business concern." [Emphasis Added.][3]

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[2]The protester states, and we have confirmed, that the applicable clause in effect for this procurement was "Notice of Small Business Set-Aside (APR 1984)." See Federal Acquisition Regulation (FAR) § 52.219-6. There does not appear to be any 1991 revision to this clause. We therefore assume that the agency intended the current version to apply, and we quote from that provision.

[3]As explained below, this clause is not the current approved version contained in the FAR. The current version, applicable to this procurement, requires each offeror to represent whether it is or is not a small business and whether all or not all "end items [not 'supplies'] to be furnished will be manufactured or produced by a small business concern." See FAR § 52.219-1. The version in the RFP was an outdated version which was generally used prior to 1986 and which, as explained below, was modified because it was found to be prejudicially ambiguous. The agency explains that it mistakenly used the old clause because "that is the way the clause was shown in the CompuServe database from which the contracting officer downloaded the standard clauses for the solicitation." The agency further states that it was unaware of the discrepancy until after the award of the contract and would have immediately corrected the discrepancy had it become aware of the discrepancy prior to award.

The agency received six offers. Three offerors, including TSAI and Dixon, were included in the competitive range. Discussions were then conducted, and each offeror was given the opportunity to make technical revisions and to submit a best and final offer (BAFO). The final technical overall ratings, along with the BAFO prices, were used to determine the greatest value to the government. The final prices were as follows:

Offeror	BAFO price
Dixon	$2,496,863
TSAI	2,789,139
Offeror A	2,996,326

The contracting officer states that while Dixon's proposal was the lowest in price, he determined that the proposal of TSAI, which was higher in technical merit and was second low in price, represented the greatest value to the government. Accordingly, after allowing a period of time for challenges to TSAI's small business size status, the contracting officer awarded the contract to TSAI on March 15, 1994.

Dixon then filed a protest with our Office and subsequently filed suit in the United States District Court for the District of Columbia, contending, among other things, that TSAI's proposal was unacceptable because TSAI had failed to certify that "all supplies" it would furnish would be manufactured or produced by a small business concern. In reading the protest and the civil complaint, the agency states that it first became aware that there "was an inconsistency in TSAI certification for Clause K11 [Small Business Concern Representation]." Specifically, the agency states that it discovered that TSAI had certified itself as a small business concern but had "checked the box" stating that "not all supplies to be furnished will be manufactured or produced by a small business concern." Dixon, in its proposal, had indicated that it was a small business and that supplies to be furnished would be manufactured or produced by a small business. Consequently, the agency terminated for convenience TSAI's contract and made award to

Dixon.[1] TSAI filed this protest with our Office and also challenged the award to Dixon in court. The court has requested our decision.

TSAI principally argues that the solicitation was defective because its outdated SBCR clause rendered it impossible for offerors to certify and commit themselves to furnishing end items as required by the nature of a small business set-aside. Consequently, TSAI argues that Dixon's certification was also defective because it only certified that "supplies," rather than "end items" produced by a small business concern, would be furnished. TSAI states that it interpreted the term "supplies" to mean the components and parts used in the assembly or production of the small business end items and that it was therefore misled into mis-certifying itself under the clause. TSAI also argues that the agency failed to conduct meaningful discussions with the firm to correct its certification error. We make the following determinations.

First, each offeror, by submitting its offer, committed itself under the Notice of Total Small Business Set-Aside clause (FAR § 52.219-6) to furnish end items produced by small business concerns. Dixon, by checking the box in the SBCR clause (52.219-1) that all supplies to be furnished would be manufactured or produced by a small business concern, took no exception to its preexisting obligation to do so under the other clause. Therefore, its proposal was acceptable. See Concorde Battery Corp., 68 Comp. Gen. 523 (1989), 89-2 CPD ¶ 17.

Conversely, TSAI's offer was ambiguous because, although it was committed to furnish end items produced by small business concerns (FAR § 52.219-6), TSAI checked the box that "not all supplies" would be furnished by a small business concerns. The term "supplies," as contained in the solicitation, can reasonably be interpreted as referring to the end items to be furnished.

We agree with the protester that the solicitation was defective because it contained an ambiguity that misled the protester as to the RFP's requirements. It is not disputed

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[1]The agency notes that TSAI had listed Grumman Corporation, a large business, as one of the actual manufacturers of the item; as well as listing Automation Delentronics Corporation, a section 8(a) small disadvantaged business (SDB), as the other actual manufacturer. TSAI, in clause K14 of the RFP, also had ultimately represented itself as a "regular dealer," after the contracting officer advised the firm before award that it had failed to complete that representation.

that the protester interpreted the term "supplies" in the SBCR clause as referring to component parts that are used in manufacturing the end item.[5] We think this interpretation by the protester was reasonable. In 1985, our Office received numerous letters complaining that small business concerns' bids were improperly being rejected by agencies for failing to certify that "all supplies" would be furnished by a small business concern. The small business bidders were found to have been interpreting the term "supplies" as referring to component parts in the same manner that the protester did so here. In response, in our decision, Mountaineer Leathers, Inc., B-218453, May 6, 1985, 85-1 CPD ¶ 505, we denied a protest from a small business protester which had mis-certified as to whether "all supplies" would be from a small business concern, but stated as follows:

> "Although the law in this situation is well-settled and does not provide a basis for accepting [the] bid, there have been a number of recent cases--such as those cited throughout this decision--in which bidders have alleged that they submitted nonresponsive bids through misinterpreting the Small Business Concern Representation clause. . . . We are, therefore, by letters of today, expressing our concern to the FAR Secretariat and to the Administrator, Small Business Administration, that this may be an appropriate matter for review and consideration of clarifying changes to the wording of the Small Business Concern Representation clause."

Shortly thereafter, and in response to our recommendation, Federal Acquisition Circular 84-16, May 30, 1986, amended FAR § 52.219-1 to clarify that the representation regarding the source of manufactured supplies refers to "end items" being acquired rather than the materials and supplies that become part of the end item.

An ambiguity exists in a solicitation if a material solicitation term is subject to more than one reasonable interpretation. See Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136. In view of the historical confusion by small business bidders as to the meaning of "all

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[5]The small business certification, as currently in effect, refers to, and applies only to, end items to be furnished under the contract; it does not preclude a small business from using in its production or manufacturing process either components or raw materials which are furnished by a large business. Computers, Inc., B-236479, Aug. 18, 1989, 89-2 CPD ¶ 155.

supplies," and their historical interpretation of that term as referring to components, and in view of our Office's response and recommendation to that confusion, we cannot say that TSAI's interpretation of the term supplies as referring to components was unreasonable. We therefore must conclude that the agency issued a defective solicitation which misled the protester and improperly caused the firm to mis-certify its small business representation clause. See id. We sustain the protest on this ground.

Concerning the lack of meaningful discussions, the agency defends the lack of discussions concerning the SBCR clause by stating that it had "overlooked" the discrepancy until after the original award to TSAI.[6] The contracting officer states in the agency report that after the initial award to TSAI and after discovering the "miscertification," he was justified in not holding further discussions because he "decided that further discussions would be futile; for TSAI had clearly certified as a regular dealer for whom a large business, Grumman, would perform manufacturing." In other words, the contracting officer considered TSAI's technical proposal as containing excessive large business efforts; specifically, he was of the opinion that Grumman's participation was so great that TSAI "could not have changed its certifications without restructuring its entire proposal."

We requested further information from the parties as to how much small business effort was reflected in the TSAI technical proposal. Both the agency and the interested party have presented credible arguments, based on TSAI's technical proposal, that Grumman's participation under the proposed effort allegedly exceeds the amount permitted under a total small business set-aside and renders TSAI ineligible to receive award under this solicitation.

If TSAI had properly certified itself as intending to furnish small business supplies, the contracting officer would have had no authority to reject the proposal as unacceptable (or failed to hold discussions) simply because he believed the proposal reflected excessive large business participation. Rather, if the contracting officer believed that the technical proposal reflected such excessive large business effort, he would have had to file a size status protest with SBA which that agency would have had to

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[6]The agency states that it did discuss with TSAI prior to award its failure to complete the Walsh-Healey certification, and TSAI elected to certify as a regular dealer. This fact does not change our opinion as to the need to discuss the TSAI's small business representation which represented a fatal flaw in the proposal.

resolve. See FAR § 19.302; 13 C.F.R. § 121.906 (1994). Stated differently, if there is an admitted lack of meaningful discussions about a term which renders a proposal technically unacceptable, we are aware of no authority which would permit the contracting officer to forego such discussions because of a size issue concerning the proposal.[7] Discussions are meant to resolve deficiencies in proposals; questions about whether there is excessive large business participation in a small business set-aside procurement is a size matter for the SBA to resolve. Our Office has no jurisdiction in such matters. See 4 C.F.R. § 21.3(m)(2).

Thus, after the agency discovered the mis-certification in TSAI's proposal after award, we think that termination of the contract and immediate award to Dixon was not a reasonable remedy. According to the facts presented by the agency itself, TSAI was the responsible offeror whose proposal represented the greatest value to the government and was most advantageous. Given this fact, and in the absence of compelling urgency, the agency should have reopened discussions to allow TSAI to clarify its certification concerning supplies to be furnished, and then, if necessary, the contracting officer should have filed a size status protest with the SBA, rather than awarding the contract to the second-rated offeror. If TSAI then failed to clarify its intentions with respect to the supplies to be furnished under its contract following the reopened discussions, or if it was determined to be other than small by the SBA, termination and award to Dixon would then have been appropriate. We therefore also sustain the protest on the ground that the agency took improper corrective action after award.

Our review of the record shows that the only major substantive issue that remains unresolved is TSAI's size status in view of its allegedly undue reliance on Grumman as reflected in its proposal. In this regard, the agency and Dixon believe that TSAI is ineligible for award because of the allegedly excessive large business effort contained in its offer. We think this is a legitimate issue of concern. Accordingly, we recommend that the agency refer the issue of TSAI's size status (including its technical proposal) to the SBA for a definitive determination of whether TSAI is legitimately a small business concern for purposes of this

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[7]In its final supplemental submission, the agency agrees that "if any uncertainty remained as to whether any of [TSAI's] end items in the set really were to be manufactured by a small business, the matter [should] be referred to the Small Business Administration for a conclusive determination."

procurement and in view of the specifics contained in its technical proposal. Following the size determination by the SBA, the agency should proceed with the award consistent with SBA's determination. If TSAI is ultimately found to be small and to represent the greatest value, we recommend that Dixon's contract be terminated for the convenience of the government and that award be made to TSAI. TSAI is also entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), TSAI should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision.

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of the United States